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Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE STAR ACQUISITION III, LLC,
a Colorado Limited Liability Company,

Debtor.

BAP No. CO-06-129

PRIMARY NATURAL RESOURCES,
INC.,

Appellant,

Bankr. No. 04-10121-SBB
Chapter 11

v.

ORDER AND JUDGMENT*

STAR ACQUISITION III, LLC and
CAMPBELL COUNTY, WY,

Appellees.

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before CLARK, McNIFF, and THURMAN, Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

Primary Natural Resources, Inc. (“Primary”) appeals the bankruptcy court’s order dismissing Star Acquisition III, LLC’s motion seeking enforcement of a sale ordered free and clear of liens. We reverse and remand.

I. Background

Star Acquisition III, LLC (“Debtor”), a Colorado limited liability company, filed a Chapter 11 petition for relief on January 5, 2004. Prior to filing, the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Debtor was the owner of various oil and gas properties located principally in Wyoming and Oklahoma. An affiliate of the Debtor, Star Resources LLC, operated the properties.

During the Chapter 11 case, the Debtor liquidated all of its oil and gas assets. Primary was the purchaser of the Wyoming Mid Value Negotiated Sale Properties (“MVN Properties”). On August 17, 2004, the bankruptcy court entered its Order Authorizing Sale of Wyoming MVN Properties (“Sale Order”). The Sale Order approved the sale “free and clear of any and all liens, claims, interests, encumbrances, mortgages, pledges, judgments, demands, charges, or obligations of any kind or nature, fixed or contingent, whether arising prior or subsequent to the commencement of the Bankruptcy Case, and whether imposed by agreement, understanding, law, equity or otherwise.” *Sale Order* at 5, ¶ 7, *in Appellant’s App.*, Vol. III at 00517.

At the time of the sale, Campbell County, Wyoming (“County”) was owed ad valorem taxes for 2002 and 2003. Those taxes were satisfied from the sale proceeds in an amount established through a series of communications among the County, the Debtor and Primary. Primary contends it also paid prorated 2004 taxes at the closing. At the time of the sale, the County advised Primary and the Debtor that additional taxes would become due for 2004.

On June 24, 2005, the bankruptcy court confirmed the Debtor’s Second Amended Plan of Reorganization. Under the confirmed plan, the Debtor was discharged of all debts owed to the effective date of the plan.

In early 2005, a dispute arose between Primary and the County concerning certain 2004 ad valorem taxes. The taxes were assessed against Star Resources LLC on personal property, production from various wells, and for a reporting discrepancy. Primary paid the taxes it believed were owed on the MVN properties. The County refused to apply the tax payments, stating it could not do so unless all due taxes were tendered. The County is currently holding Primary’s

payments in escrow.

The first half of the disputed 2004 taxes became due on September 1, 2004, after the sale to Primary. The second half of the 2004 taxes became due on March 1, 2005. The County is asserting a lien on Primary's properties in Campbell County for the disputed 2004 taxes.

In response to the dispute, the Debtor filed a Motion for Order in Aid of Sale of Assets Free and Clear of Liens ("Motion Regarding Sale"). The Debtor requested an order preventing the County from asserting liens "unrelated to the specific property to which the ad valorem tax applies." *Motion Regarding Sale, in Appellant's App., Vol III at 599.* Primary joined in the Motion Regarding Sale, seeking enforcement of the Sale Order.¹

Under a deadline for the filing of dispositive motions, the County filed a Motion to Dismiss the Motion Regarding Sale ("Motion to Dismiss"). Primary objected, and the bankruptcy court held a non-evidentiary hearing. On the record, the bankruptcy court found that: the 2004 taxes became due after the sale was consummated; the Debtor's plan was confirmed and substantially consummated; the dispute was one that did not involve the Debtor but rather a creditor and a purchaser; third parties might be necessary for resolution of the dispute; and the issues were strictly questions of Wyoming tax law. For those reasons, the bankruptcy court concluded it had no jurisdiction over the dispute, but that if it did, it would abstain on the same grounds.

On November 22, 2006, the bankruptcy court entered its Order Granting Motion to Dismiss for lack of subject matter jurisdiction and that "even if it did have jurisdiction over the proceeding, it would abstain under § 305 of the Code[.]" *Order Granting Motion to Dismiss, in Appellant's App., Vol. III at 720.*

¹ The relief requested by the Debtor and Primary in the Motion Regarding Sale is in the nature of injunctive relief. Neither the Debtor nor Primary filed an adversary proceeding under Fed. R. Bankr. P. 7001.

Primary appealed.

II. Jurisdiction and Standard of Review

The Bankruptcy Appellate Panel has jurisdiction to hear appeals from final judgments within this circuit. 28 U.S.C. § 158(a)(1), (b)(1), & (c)(1). The parties have not chosen to have this appeal heard by the United States District Court for the District of Colorado; therefore, they are deemed to have consented to jurisdiction of the Bankruptcy Appellate Panel. 28 U.S.C. § 158(c)(1)(A) & (B); Fed R. Bankr. P. 8001(e).

Questions involving the jurisdiction of the bankruptcy court are questions of law subject to *de novo* review. *In re Courtesy Inns, Ltd.*, 40 F.3d 1084, 1085 (10th Cir. 1994). Under the circumstances of this case, the order of abstention is a matter within the sound discretion of the bankruptcy court, and is reviewed for an abuse of discretion. *In re Petrie Retail, Inc.*, 304 F.3d 223, 232 (2d Cir. 2002).

III. Discussion

The bankruptcy court concluded it had no subject matter jurisdiction over the tax dispute. This Court concludes the case must be remanded because the bankruptcy court did not make adequate findings for appellate review.

Jurisdiction

A bankruptcy court's subject matter jurisdiction is derived from the district court's jurisdiction granted under 28 U.S.C. § 1334(b). District courts "may provide that . . . any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a). The United States District Court for the District of Colorado has done so pursuant to D.C. Colo. LCivR 84.1(A).

Proceedings "arising in" a bankruptcy case are those that could not exist outside of the case, but are not causes of action created by the Bankruptcy Code. *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 771 (10th Cir. BAP 1997). A motion for an order authorizing a sale of estate property is a core

proceeding within the bankruptcy court's "arising in" jurisdiction, as is enforcement of a sale order. 28 U.S.C. § 157(b)(2)(N); *In re Eveleth Mines, LLC*, 318 B.R. 682, 687 (8th Cir. BAP 2004).

Whether a bankruptcy court has "related to" jurisdiction over a dispute between third parties depends upon application of the principles stated by the Court of Appeals for the Tenth Circuit in *Gardner v. United States (In re Gardner)*, 913 F.2d 1515, 1518 (10th Cir. 1990). A proceeding within the bankruptcy court's "related to" jurisdiction is one that could have been commenced in federal or state court in the absence of the bankruptcy case, if the "outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Id.*, quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). Related jurisdiction matters are not core proceedings. *Plotner v. AT & T Corp.*, 224 F.3d 1161, 1173 (10th Cir. 2000).

Primary contends the County is seeking to enforce a lien on the MVN Properties for taxes incurred on pre-sale production from the MVN Properties and from production on non-MVN Properties sold to third parties. According to Primary, some of the properties sold to third parties were sold by the Debtor even before Primary purchased the MVN Properties. Primary argues the County is in violation of the free and clear provisions of the Sale Order, and that the issues are, therefore, within the bankruptcy court's core jurisdiction.

On the other hand, the County continues to assert that because the taxes became "due" under Wyoming law after the sale was completed, the taxes are post-sale taxes not covered by the Sale Order. Based on those facts, the County contends the matter is not within the bankruptcy court's "arising in" or "related to" jurisdiction. The County has not discussed, admitted or disputed Primary's assertion that it is attempting to impose a lien on the MVN Properties for taxes that were incurred by Star Resources prior to the sale to Primary. At the bankruptcy court hearing, the County only addressed collateral matters: the taxes

were assessed based on self-reporting by the oil and gas producer, and the county is unable to segregate the taxes by specific properties in its tax assessments.

To the extent the 2004 disputed taxes were incurred on oil and gas produced after the sale of the MVN Properties to Primary, the bankruptcy court's decision is correct under the principles of *Gardner*. Any issues regarding taxes incurred or arising on post-sale production are not within the bankruptcy court's related jurisdiction for all of the reasons stated by the bankruptcy court in its oral ruling. However, the ruling is only correct so far as it goes, and the record is insufficient to determine whether any or all of the taxes fall into that post-sale category.

To resolve the jurisdictional question, findings regarding the circumstances of the 2004 disputed taxes are critical. If the taxes are taxes of the Debtor for oil and gas produced by the Debtor's affiliate before the sale and are being assessed on production reports filed by the Debtor or its affiliate, the Sale Order is implicated. In other words, the "due" date under state law does not fully resolve the issue of when the taxes arose. Under the Sale Order, the MVN Properties were sold free and clear of any contingent interest, and the tax liens may be barred. In that case, the matter is one arising in the bankruptcy case, and the bankruptcy court has jurisdiction to enforce its order.

Permissive Abstention

The bankruptcy court also ruled that even if it had jurisdiction to hear the tax issues, it was abstaining under 11 U.S.C. § 305.² However, the bankruptcy court cannot properly determine whether discretionary abstention is appropriate under 28 U.S.C. § 1334(c)(1) or under the Tax Injunction Act, 28 U.S.C. § 1341, before it determines the jurisdictional question. Consequently, a decision from this Court on the propriety of the bankruptcy court's abstention ruling would be

² Section 305 is not applicable to abstention in this context. The appropriate statutory scheme related to abstention over proceedings and discrete issues is found in 28 U.S.C. § 1334(c).

premature.

IV. Conclusion

Because the record is insufficient for the Court to determine the specific facts regarding the 2004 disputed taxes, this case is remanded for findings of fact and further proceedings as necessary.